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By Fax - 202-720-8938

Docket Clerk  
Market Order Administration Branch  
Fruit & Vegetable Programs  
Agricultural Marketing Service  
Room 3071-South - Stop 0237  
U.S. Dept. of Agriculture  
14<sup>th</sup> & Independence Avenue SW  
Washington, DC 20250

Re: Docket No. FV03-989-6-IFR - Comments in Opposition to Reclassifying  
Oleates as Natural Sun-Dried Raisins, 68 Fed. Reg. 42943 (July 21, 2003).

I write on behalf of several raisin industry entrepreneurial growers and handlers in opposition to any effort to extinguish the Oleate varietal type by combining it with Natural Sun-Dried raisins, and to support the continuation of Oleates as a separate varietal type. Oleates have traditionally been recognized as a separate varietal type and there is no reason to abolish this variety especially at this time of growing world demand. In 1981, Oleates were given recognition as a separate and unique varietal type having been previously classified under the Dipped and Related Seedless variety. USDA has provided no factual basis to extinguish this varietal type. Indeed, to do so at this time would be arbitrary and capricious and would completely destroy the economic viability of this growing segment of the industry.

The Order Requires Recognition of Separate Varietal Types.

The Order authorizes quality and volume regulations that are applied according to varietal type of raisin. Section 989.10 defines the term "varietal type" to mean raisins generally recognized as possessing characteristics differing from other raisins in a degree sufficient to make necessary or desirable separate identification and classification. That section includes a list of eight varietal types, and provides authority for the RAC, with the approval of USDA, to change this list. A description of these varietal types, along with additional varietal types, is contained in § 989.110 of the Order's administrative rules and regulations. There are currently 10 different varietal types of raisins listed in this section. Paragraph (a) in § 989.110 currently defines the Natural varietal type to include all sun-dried seedless raisins that possess characteristics similar to Natural Thompson Seedless (NTS) raisins which, for the purpose of expediting drying, have not been dipped in or sprayed with water, with or without soda, oil or other chemicals prior to or during the drying process. Naturals are the predominant varietal type of California raisin, comprising about 90 percent of California's raisin production. Section 989.110(c) defines the Oleate varietal type to include all raisins produced by sun-drying or artificial dehydration of seedless grapes which, in order to expedite drying, are dipped in or sprayed with water with soda, oil, ethyl oleate, methyl oleate or any other chemicals either while such grapes are on the vine or after they have been removed from the vine.

Thus, the varietal classification distinguished sun-dried raisins, including those dried on the vine (DOV) from raisins dried by artificial means, and in turn, from raisins sprayed with oleate (whether dried DOV, in the sun, or by artificial means).

#### The Order Cannot Be Amended By Informal Rulemaking.

Section 989.10 of the Order was amended by formal rulemaking, ratified by grower referendum, to specifically recognize Oleates as a distinct varietal type. 48 Fed. Reg. 32974 (July 20, 1983); 48 Fed. Reg. 14911 (April 16, 1983) (recommended decision); 47 Fed. Reg. 34790 (August 11, 1982) (notice of hearing). It is theoretically possible that the Order could leave the specification of varietal types entirely up to informal rulemaking, or possibly the addition of varietal types. But, once the Order, § 989.10, was itself amended to create Oleates as a distinct varietal type, it can only be abolished by an equivalent formal rulemaking procedure. Growers and handlers of Oleates are protected by due process, the AMAA (Order based upon notice, formal hearing, findings, and grower ratification), and the APA, §§ 556 and 557, from having the benefits of the

Oleate variety extinguished by mere informal rulemaking. If Oleates could be so easily destroyed, the above-listed protections would be eviscerated and meaningless.

Oleates Remain a Distinct Varietal Type of Growing Importance.

The Oleate varietal type was created in 1981 by informal rulemaking to § 989.110. Two reasons were given for this change. First, Oleates needed to be separated from the Dipped and Related type in order to maintain equity between the sun-dried and artificially dehydrated varietal types. Second, the decision recognized that the growing demand for Oleates could best be satisfied if growers were free to respond to market demand for this variety without regard to the possibly more restrictive volume limitations for Natural and Dipped raisins.

The 1983 Recommended Decision explained:

Pursuant to such rulemaking authority, "Oleate and Related Seedless" was included as another varietal type in §§ 989.110 of the rules and regulations in 1981 to provide equity among the sun-dried and artificially dehydrated raisin segments of the industry in volume regulation computations.

Prior to the change, oleate raisins, which were developed in an attempt to hasten the sun-drying process and reduce problems resulting from untimely rains, were included with artificially dried water-dipped raisins. Experience with the volume regulation formula in §§ 989.54 established that whenever there was a substantial production of oleate raisins in any one year, the water- dipped portion of the free tonnage for that varietal type was reduced. In addition, the quantity of oleate raisins needed by the industry to develop free tonnage markets for that type of raisin was restricted. To correct these problems, Oleate and Related Seedless was established as a separate varietal type. Section 989.10 should be revised by adding Oleate and Related Seedless to the list of varietal types contained in that section to conform with current industry operating practices and to conform with the list in §§ 989.110.

48 Fed. Reg. 14911, 14912 (April 16, 1983). The 1981 informal rulemaking decision adding Oleates as a separate variety under § 989.110 explained as follows:

The segment of the raisin industry making water-dipped and soda-dipped raisins is relatively small and is reasonably capable of tailoring supplies of those raisins to market needs. There are approximately 30 dehydrators in the industry capable of making water-dipped and soda-dipped raisins.

Production of oleate raisins is an outgrowth of the production of natural (sun-dried) raisins. Oleate raisins are of relatively recent origin to the U.S. raisin industry and were developed in order to reduce the time required to sun-dry raisins and reduce any problems associated with untimely rains during drying. Each producer making sun-dried raisins also is a potential producer of oleate raisins. There are roughly 4,800 producers making sun-dried raisins. Their number can fluctuate from year to year depending upon several factors, the most important of which is the prospective price for raisins versus the price offered by wineries for raisin variety grapes. The large number of producers and the versatility of the Thompson Seedless grape make it virtually impossible to tailor production of these raisins to free tonnage needs.

Currently, if a producer sprays grapes to accelerate the rate of drying, the dried product would be classified as Dipped and Related Seedless raisins. If oleate production is minimal, there would be little effect on any volume control percentages established for Dipped and Related Seedless raisins. However, if production of oleate raisins in any one year is substantial, the reserve percentage for Dipped and Related Seedless raisins would be inflated and the water-dipped segment's portion of the free tonnage for that year would be reduced.

To provide equity between the sun-dried and artificially dehydrated raisin segments of the industry in volume regulation computations, water-dipped, soda-dipped, and oleate raisins will be classified on the basis of whether or not they are sun-dried or artificially dried.

46 Fed. Reg. 39120 (July 31, 1981).

The notice offers no evidence that these conditions have changed. Without a proper factual predicate for changed factual circumstances, the abolition of Oleates would be the classic arbitrary and capricious decision.

The notice offers absolutely no evidence that Oleates have ceased to be a distinct varietal type within the meaning of § 989.10. Indeed, as a lighter raisin, despite their greater production cost, they compete favorably with the dominant world variety, Sultanas. To abolish the Oleates variety in the midst of growing demand would be the essence of an arbitrary and capricious decision, and would punish those growers and packers who have planned for and invested in development of this market. It is simply unthinkable to reward such incentives by simply abolishing the variety. Since risks and greater costs are associated with producing this variety, inclusion of Oleates in the much larger category of Naturals would make marketing unprofitable and destroy the incentive for further investment and growth, contrary to the long-run interests of the entire industry.

The proposal in the notice to amend § 989.166 to permit an even exchange of non-Oleate free tonnage Naturals for Oleate held in reserve has no merit. The economic viability of Oleates depends on their remaining free of volume restrictions, essentially because of greater risks in this market and increased production costs for the Oleate treatments. Given that volume regulation is already so economically devastating for both handlers and growers, there would be no incentive to further increase the costs of raisins subject to volume restrictions without an equal or greater offsetting increase in marketing opportunity.

#### Changed Cultural Practices Cannot Justify Abolishing Oleates.

The notice claims that an increasing quantity of raisins are produced by drying on the vine (DOV). By definition, DOV raisins are part of the Natural sun-dried category. What characterizes the Oleate variety is the addition of oleate to hasten drying and reduce rain risks. It makes no difference whether the raisins are dried in trays or on the vines, as they are properly classified as Oleates in either case. Thus, the shift in drying Naturals from tray-drying to DOV is of no relevance to the existence or abolition of the Oleate varietal type.

#### The Inspection Service is Capable of Proper Classification.

The 1981 decision creating the distinct Oleate varietal type correctly recognized that the inspection service was fully capable of making the proper classification:

The inspection service also recommended a change in the proposed surveillance and identification requirements which were proposed in §§ 989.110(i). Under the proposal, water-dipped raisins produced without inspection surveillance would have been classified as Oleate and Related Seedless, even though the inspection service may have disagreed with that classification. This would have resulted in the inspection service certifying incorrectly the varietal type of raisins. It pointed out that under the proposed surveillance and identification requirements, the classification of water-dipped raisins could be manipulated by arranging for or not arranging for surveillance. This could create problems in applying volume regulations especially if the regulation would be more restrictive for one of these varietal types. For these reasons, and to continue the flexibility the inspection needs in classifying raisins, the proposed surveillance and identification requirements are deleted from the final rule.

Under current inspection service classification procedures, the varietal type category is declared on the application for inspection. If the inspector disagrees with that declaration, the inspector informs the applicant and gives the applicant the opportunity to substantiate the stated declaration. If adequate proof is not presented to justify the applicant's declaration, the inspector classified the raisins, by type, on the basis of his judgment. If the applicant appeals this classification, the matter is referred to the Committee for resolution.

The change in the term "Dipped and Related Seedless" to "Dipped Seedless," and the addition of the new category, "Oleate and Related Seedless" necessitates some conforming changes in Subpart--Supplementary Regulations (7 CFR 989.202-989.233; 45 FR 75164), Subpart--Conversion Factors (7 CFR 989.601), and Subpart--Quality Control (7 CFR 989.701-989.703; 45 FR 65512), and these changes also are in this document.

After consideration of all relevant matter presented, including that in the notice, the comments submitted, the information and recommendation submitted by the Committee, and other available information, it is further found that the classification of Dipped Seedless, and Oleate and Related Seedless, raisins as separate varietal

types in §§ 989.110 of Subpart--Administrative Rules and Regulations (7 CFR 989.102-989.176), and the necessary conforming changes in Subpart--Supplementary Regulations (7 CFR 989.202-989.233; 45 FR 75164), Subpart--Conversion Factors (7 CFR 989.601), and Subpart--Quality Control (7 CFR 989.701-989.703; 45 FR 65512), will tend to effectuate the declared policy of the act.

46 Fed. Reg. 39120, 39121 (July 31, 1981) (emphasis added)..

The notice offers no evidence that the inspection service is not capable of properly classifying raisins as the Oleate variety.

The notice claims that a study was conducted in an attempt to distinguish oleate applied to grapes from oleate applied to raisins. The notice states in conclusory fashion: "Preliminary information indicates that distinguishing if Oleate or similar drying agent were applied to grapes or raisins may not be possible." First, the rule cannot be based in any way on this alleged study because its results and methodology were not published or otherwise made available to interested parties. Moreover, the notice concedes that results are only "preliminary" and that a proper distinction "may" not be possible. Such equivocation cannot be the basis to abolish a varietal type which the inspection service has previously represented can be properly classified.

The Recent Growth in Demand for Oleates Provides No Evidence to Extinguish this Varietal Type.

The notice claims that "raisins could be represented as Oleates to circumvent the volume regulations that are typically in place for Naturals." As noted above, however, the inspection service has previously claimed that it is capable of properly distinguishing varietal types. Furthermore, the notice offers no evidence of this alleged abuse. Instead, the notice attempts to rely on the growing demand for Oleates. Contrary to the proposed conclusion from this evidence--that Oleates must be extinguished as a varietal type--such growing demand logically demonstrates the wisdom of USDA's original decision to recognize a separate varietal type for Oleates and that growers can respond to this growing demand without creating disorderly marketing conditions that might arguably justify either volume regulation or extinguishing this variety.

USDA explains that average Oleate acquisitions for the seven years from 1992-93 through 1999-2000 were 441.38 tons. Acquisitions for the next two seasons were, respectively, 3,669 and 6,495 tons. The notice goes on to explain that RAC recommended volume regulation for Oleates for the past two seasons but rescinded its recommendations because deliveries were far below growing trade demand.

The fact that Oleates were delivered later in the season to meet demand is no evidence of abuse. Rather, growers were properly responding to the increased demand for Oleates in a timely manner without creating disorderly marketing conditions. In the event that disorderly marketing were to occur at some point in the future for the Oleates variety, the Order authorizes, if justified, appropriate volume restrictions.

USDA Has No Proper Basis for an "Interim" Final Rule Without Delayed Effective Date.

The APA requires advance notice of proposed rules and delayed effective date in part to ensure that the agency keeps an open mind and that a regulatory momentum and mindset does not overtake USDA's obligation to engage in reasoned decisionmaking, including a proper justification for such a radical departure from the long-established precedent of a separate Oleate variety. The fact that this matter may have been discussed for months at various RAC meetings demonstrates that USDA had plenty of time to engage in routine rulemaking procedures. RAC discussions are not a substitute for rulemaking procedures required by the APA, in part because USDA reserves to itself the right to accept, reject, or modify any RAC recommendation. USDA should have published this proposal for comment months ago, as well as fully disclose all the information on which the proposal is based. Finally, growers have every right to rely on the existence of a separate Oleate variety, as they have for over 20 years.

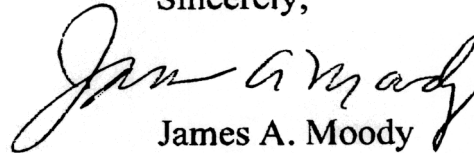
The so-called "need" to implement a final rule immediately is completely irrelevant. There is simply no emergency. USDA has known for months about the RAC proposal, and could have published it for comment long ago. USDA is also aware that the addition or deletion of a varietal type, at least for regulatory purposes, has to occur well in advance of a season to give producers and handlers proper notice so that they can make or avoid, as appropriate, decisions in reliance on what the varietal types will be for the upcoming season.



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The proposal should be rejected for the above reasons. The Oleate varietal type, originally authorized by USDA in 1981, should continue as an alternative for growers and handlers. The market for Oleate is of growing importance and should not be subject to being molested by costly and inefficient volume restrictions. Finally, since Oleates are specifically provided for in the Order, growers and handlers of this variety are protected by the procedural safeguards in the AMAA and the APA from its arbitrary extinction.

Sincerely,

A handwritten signature in cursive script, appearing to read "James A. Moody".

James A. Moody